

EPA meeting with Gowan  
regarding Phosmet

Attendees

5/18/01 Gowan request for meeting with Michael Shapiro

<u>NAME</u>	<u>ORGANIZATION</u>	<u>PHONE</u>
CAROLYN HOSKINSON	EPA/OSWER	202 260-2256
MICHAEL SHAPIRO	EPA/OSWER	202 260-4610
John Ferris	EPA/OSWER/CEPPO	202-564-7992
Kathy Franklin	EPA/OSWER/CEPPO	202-564-7907
CRAIG MATTHIESSEN	EPA/OSWER/CEPPO	202-564-8016
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### U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response

Gowan Company  
Friday, May 18, 2001  
1:30 p.m. - 2:00 p.m.

- 1.0 Introduction
- 2.0 Phosmet Delisting Petition
- 3.0 EPA Update
- 4.0 Next Steps

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## BRIEFING PAPER – DELISTING PHOSMET FROM THE EPCRA LIST OF EXTREMELY HAZARDOUS SUBSTANCES

### BACKGROUND AND STATUS OF PETITION TO DELIST

- Gowan Company submitted to EPA on August 8, 1996, a petition to delist phosmet from the list of extremely hazardous substances (EHS) promulgated under Section 302 of the Emergency Planning and Community Right-to-Know Act (EPCRA).
  - Phosmet was on that original EHS list, which was published in the *Federal Register* on November 17, 1986.<sup>1</sup>
  - The original list of EHSs – including phosmet -- was prescribed by Congress and required to be published within 30 days of EPCRA's enactment. It consisted of the list of substances published in November 1985 by EPA in Appendix A of its "Chemical Emergency Preparedness Program Interim Guidance."
- EPA's consultant, ICF Consulting Group, prepared for EPA a draft evaluation of Gowan's petition, entitled "Draft Evaluation of Phosmet Delisting Petition," dated March 31, 1997 (Draft Evaluation). That evaluation identified the following two options for disposition of the petition:
  - Option 1: Propose to delete phosmet from the EHS list because there are no valid data indicating that it meets the main listing criteria.
  - Option 2: Keep phosmet on the list as an "other" chemical, based on oral toxicity data that meet the "other" criterion and propose to change the Threshold Planning Quantity, based on a new ranking factor developed from the oral toxicity data.<sup>2</sup>
- EPA has yet to make a final determination on Gowan's petition to delist.

### CRITERIA FOR EHS LISTING/DELISTING AND THEIR APPLICATION TO PHOSMET

- EPCRA outlines the criteria for delisting an EHS in a general manner:

(4) Revisions. The Administrator may revise the list and thresholds under paragraphs (2) and (3) from time to time. Any revisions to the list shall take into account the toxicity, reactivity, volatility, dispersability, combustability, or flammability of a substance. For

<sup>1</sup> 51 Fed. Reg. 41570, 41585 (Nov. 17, 1986).

<sup>2</sup> Draft Evaluation at 9.

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purposes of the preceding sentence, the term "toxicity" shall include any short- or long-term health effect which may result from a short-term exposure to the substance.<sup>3</sup>

- EPA's 1987 final rule establishing the EHS list,<sup>4</sup> EPA's 1986 interim final rule establishing the list<sup>5</sup>, and EPA's 1987 Technical Guidance<sup>6</sup> discuss the criteria for delisting and use two categories for assessing delisting -- the main acute toxicity criteria and the "other" criteria.

- Under EPA's Technical Guidance, chemicals may be listed on the EHS list based on the main (toxicity alone) criteria, if their acute toxicity is equal to or greater than the enumerated acute toxicity criteria for inhalation, dermal, or oral exposures. The Draft Evaluation makes clear that phosmet does not meet the main listing criteria.<sup>7</sup>
- The Technical Guidance also states criteria for identifying "other hazardous substances produced in large quantities that may present severe health hazards to humans exposed during a chemical accident or other emergency." To meet the other criteria under the Technical Guidance, a chemical must meet two criteria:
  - It must meet acute toxicity criteria that indicate a level of acute toxicity somewhat less than that indicated by the main acute toxicity criteria, and
  - It must either be a "high production capacity" chemical or a chemical that has "known hazards"; the Technical Guidance gives as an example of the latter category chemicals that "caused death or injury in accidents."
- Phosmet does not meet the "other" criteria because it is not a high production capacity chemical and is not a chemical of "known hazards" akin to those EHS chemicals listed on that basis.

<sup>3</sup> EPCRA § 302(a)(4), 42 U.S.C. § 11002(a)(4).

<sup>4</sup> 52 Fed. Reg. 13378, 13387 (Apr. 22, 1987).

<sup>5</sup> 51 Fed. Reg. at 41574.

<sup>6</sup> EPA, Federal Emergency Management Agency, and the Department of Transportation, *Technical Guidance for Hazards Analysis: Emergency Planning for Extremely Hazardous Substances* (Dec. 1987) at B-2 (Technical Guidance).

<sup>7</sup> Draft Evaluation at 9.

**Bergeson & Campbell, P.C.****PHOSMET DOES NOT MEET EITHER THE MAIN OR "OTHER" LISTING CRITERIA**

- There are no valid data indicating that phosmet meets the main listing criteria, which are solely toxicity-based.
  - The Draft Evaluation confirms the conclusion that no valid data show phosmet meets the listing criteria.<sup>8</sup>
  - EPA must delist phosmet because there are no data establishing that phosmet in fact meets or exceeds the main criteria. In *A.L. Laboratories, Inc. v. EPA*, the court held that EPA may not decline to delete substances incorrectly included on the initial EHS list based on invalid data, in the absence of other existing data demonstrating the acute toxicity criteria are met.<sup>9</sup> The court rejected EPA's determination that Section 302 of EPCRA precluded EPA from removing any chemical initially listed until the short-term and long-term effects which may result from a short-term exposure to such chemical have been determined and evaluated.<sup>10</sup>
- Phosmet does not meet the criteria for listing under the "other" criterion.
  - Phosmet is not a high production capacity chemical.
    - EPA has nowhere specified a definition of "high production capacity" chemicals.
    - EPA has listed under the "other" criterion only chemicals whose production volume has vastly exceeded that of phosmet. The Technical Guidance provides that candidates for listing in the "other" category were identified from the high production capacity chemicals listed in the SRI International publication, 1985 Directory of Chemical Producers, United States of America. EPA staff members state that they believe the substances currently listed based on the "other" criteria were among the top 50 produced chemicals in the U.S. at the time they were listed.
    - Phosmet production comes nowhere near the capacity of the top 50 chemicals.

<sup>8</sup> *Id.*

<sup>9</sup> *A.L. Labs., Inc. v. EPA*, 674 F. Supp. 894, 899-900 (D.D.C. 1987).

<sup>10</sup> *Id.*

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- The incident data associated with phosmet do not justify listing under the "other" criterion.
  - EPA's Office of Pesticide Programs' Revised Human Health Risk Assessment discusses incident data, but does not characterize those data as being of a severe nature nor a result of accidental release, criteria that are necessary to meet this requirement under the EHS listing criteria.
  - EPA's Technical Guidance indicates that the basis for the criteria for identifying a chemical as an EHS is to identify "those chemicals that, because of their inherent toxicity, are most likely to cause severe toxic effects in humans who are exposed to them due to an accidental release."<sup>11</sup>
  - The Technical Guidance confirms that with respect to EHSs, EPCRA is concerned, primarily with accidental releases from facilities to the surrounding community and the development of state and local community programs to plan for and address such releases.<sup>12</sup> EPCRA is not intended to list chemicals on the EHS list based solely on the risks those chemicals may pose as consumer products to members of the general public who use those products.
  - The OPP incident data do not relate to accidental releases, but to misuse scenarios. The OPP incident data do not establish or contend that phosmet is inherently more toxic than organophosphate insecticides or other pesticides, or that phosmet poses a significant risk of harm to surrounding communities from the release from a facility.
- Phosmet thus does not meet the main or "other" EHS listing criteria and should be removed from the EHS list.

<sup>11</sup> Technical Guidance at B-1.

<sup>12</sup> See, *A.L. Labs., supra*, 674 F. Supp. at 895; Technical Guidance at B-1; EPCRA §§ 301-303, 42 U.S.C §§ 11001-11003.